ELDERS KEEP LTD.

v.

LUEN MEI PLASTIC INDUSTRIES SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D2-23-159-88]
4 OCTOBER 1988

***NEGOTIABLE INSTRUMENTS**: Bills of Exchange - Part payment of principal on each of the bills - Claim for balance - Whether bill presented for payment - Date of maturity - Bills not stamped - Effect of ss. 17(1), 52(1), 19(2) Bills of Exchange Act.*

***CIVIL PROCEDURE:** Application for summary judgment - Appeal - Whether statement of claim discloses cause of action.*

The plaintiffs are a British Company and sue the 1st defendants for amounts outstanding on two bills of exchange "drawn" by the plaintiffs upon the 1st defendants in England, payable to the plaintiffs on 1st presentation on 6 April 1987 and 23 November 1987 respectively. It is contended that the 1st defendants are the acceptors of the two bills. The other defendants are sued as guarantors of the 1st defendants.

There had been part payment of principal in respect of each of the bills and the plaintiffs are claiming interest calculated on the balance of the principal sum outstanding.

The plaintiffs had successfully taken out an O. 14 application for summary judgment against all the defendants.

The defendants appeal against the summary judgment. The defendants contended (1) the statement of claim does not disclose a cause of action in that the plaintiffs had failed to plead that there had been due presentation of the bills for payment, (2) the bill of exchange had not been stamped and thus whether they can be admitted as evidence, (3) the law applicable.

Held: dismissing the appeal:

[1] There had been due presentation that resulted in non-payment by the words 'duly dishonoured' pleaded in para. 5 of the statement of claim. There can be no dishonour unless there was a presentation.

[2] The two bills of exchange may be admitted in evidence on payment of the duty and penalty, if any, chargeable under the provisions of one or the other of the ss. 43 and 47 of the Stamp Act.

[3] Malaysian law is applicable as the English law is the same as Malaysian law on the subject.

[Appeal dismissed subject to the bill of exchange being duly stamped & penalties for late stamping have been paid or exempted.]

Case referred to:
National Shipping Corporation v. Arab [1971] 1 LLL Reports 363

Legislation referred to:
Bills of Exchange Act 1949, ss. 17(1), (2), 19(2), 52(1), 72, (a), 92(1), 101(3)(a)
Stamp Act 1949, ss. 43, 43(5)(b), 47, 47(1)(ii), 52(1)

Other sources referred to:
Bills of Exchange 25th Edn.
Mallal's Supreme Court Practice
Private International Law by Cheshire & North, 10th Edn.

For the appellants/defendants - K. Balaguru (C.T. Chan with him); M/s. A.K. Lee & Co.
For the respondents/plaintiffs - K. Kanagasingam; M/s. Allen & Gledhill

JUDGMENT

VC George J:
[On encl. (14)]

The plaintiffs are a British Company and sue the 1st defendant for amounts outstanding on two bills of exchange "drawn" according to para. 4 of the statement of claim, "by the plaintiffs upon the 1st defendants in England, payable to the plaintiffs on 1st presentation on 6 April 1987 and 23 November 1987 respectively." It is contended that the 1st defendant is the acceptor of the two bills. The other defendants are sued as guarantors of the 1st defendant.

Particulars are given in the statement of claim as to how the amounts said to be outstanding are arrived at. The particulars show that there had been part payment of principal in respect of each of the bills and that the plaintiffs are claiming interest calculated on the balance of the principal sum outstanding from time to time in respect of one bill at 14% per annum and in respect of the other at 15.2625% per annum.

Then comes para. 5 of the statement of claim which reads as follows:

> 5. The said bills of exchange have been duly dishonoured and protested for non-payment.

The plaintiff had successfully taken out an O. 14 application against all the defendants. The matter before me is the appeal by the defendants against the summary judgment that was entered against them.

The first of 3 points taken in the submission by Encik K. Balaguru of Counsel for the defendants/appellants in effect was that the statement of claim does not disclose a cause of action in that the plaintiffs had failed to plead that there had been due presentation of the bills for payment. It was his contention that para. 5 of the statement of claim did not meet the omission. He contended that the statement of claim "does not state what kind of dishonour there was and what kind of non-payment."

The connotation and effect of the words "duly dishonoured" pleaded in para. 5 of the statement of claim is that there had been due presentation that resulted in non-payment. There can be no dishonour unless there was a presentation. Particulars of when, where and how the presentation was made are, particularly in the case of an acceptor without qualification, particulars not essential for there to be a complete cause of action as a perusal of the relevant sections of the Bills of Exchange Act will show.

Section 17(1) of the Bills of Exchange Act provides that the acceptance of a bill is signification by the drawee of his assent to the order of the drawer. Section 17(2) provides that the acceptance must be written on the bill and it must not express that the drawee will preform his promise by any other means than the payment of money. As Byles on *Bills of Exchange* 25th Edn., p. 97 puts it:

> The acceptance of a bill is therefore, in plain terms, a written engagement to pay the bill when due in money and by no other means.

Now having accepted the bill is there a need to present the bill for payment before the acceptor can be said to be liable on the bill? Section 52(1) provides the answer:

> 52(1) When a bill is accepted generally, presentation for payment is not necessary in order to render the acceptor liable.

And s. 19(2) defines "general acceptance":

> 19(2) A general acceptance assents without qualification to the order of the drawer.

It is plain from the terms of the statement of claim that the averment is that the acceptance was in respect of bills for fixed amounts to mature on a fixed date in each case. The 1st defendant is not contending that the bills had not been accepted or that the acceptances were qualified. In that situation s. 52(1) operates. The learned authors of Byles 25th Edn. say, at p. 112 in the commentary on the identical English s. 52(1), that while it is usual to present to the acceptor for payment s. 52(1) makes such presentation unnecessary to bring home liability to the acceptor. Even if there was no fixed date of maturity (as is not the case here) but the instrument is payable on demand, as against the acceptor there is no need to even make a demand. The action itself constitutes the required demand (see cases at Note 6 at p. 112 of Byles). A similar rule (s. 92(1) of the Act) makes presentment for payment unnecessary in the case of a maker of a promissory note. *Mallal's Supreme Court Practice* at para. 18/7/5 recognises that while the general rule is that a party claiming on a promissory note or a bill of exchange has the obligation to allege presentation of the note or bill and plead notice of dishonour, such general rule does not apply in the case of the maker of a promissory note or the acceptor of a bill of exchange.

The first submission fails.

The next point taken by Encik Balaguru is based on the fact that the bills of exchange on which this action is based are not stamped. It is contended that whether they can be admitted in evidence provides the defendants with a triable issue.

The bills in the instant case are bills drawn in England and accepted by the 1st defendant in Malaysia. The first proviso to sub-section (a) of s. 72 of the Bills of Exchange Act is relevant:

> 72. Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:
>
> (a) the validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made:
>
> Provided that:
>
> (i) where a bill is issued out of Malaysia it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

Further, in effect, ss. 43 and 47 of the Stamp Ordinance provide that a bill of exchange drawn out of Malaysia may be stamped after execution and even after acceptance and if more than 30 days have expired after it had been received in Malaysia, by payment, in addition to the stamp duty, of the penalties prescribed by s. 43(5)(b) (identical penalties are prescribed by s. 47(1)(ii) (unless the penalty is reduced or remitted by the Collector of Stamp Duties).

I pause to note that s. 101(3)(a) of the Bills of Exchange Act, in the context, is seen to be irrelevant when the proviso (i) of s. 72(a) of the Bills of Exchange Act is read together with s. 43 and/or s. 47 of the stamp Ordinance.

Now s. 52(1) of the Stamp Act provides as follows:

> 52.(1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by separate consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped:
>
> Provided that:
>
> (a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under the provisions of s. 43 or s. 47 of this Ordinance;

The position is clear. The two bills of exchange may be admitted in evidence on payment of the duty and penalty, if any, chargeable under the provisions of one or the other of the ss. 43 and 47 of the Stamp Act.

In my judgment the position of the two bills of exchange *vis-a-vis* stamping being clear it does not provide a triable issue. All that needs to be done is for directions to be given to ensure that the documents are duly stamped. The position could have been different if the bills were drawn in Malaysia but that is not the case here.

The last point raised is that the law applicable to the bills as to their validity being English law (the bills having been drawn in England - see s. 72 of the Bills of Exchange Act), although the action on the bill may be tried in our Courts, our Courts should apply English law which is foreign law. That being the case, it is submitted that the O. 14 summary procedure is not suitable since what the foreign law is should be proved as a fact to the Court by the oral testimony of experts on the relevant foreign law. While there is indeed such a rule it has to be consideration in the light of the presumption that foreign law is the same as Malaysia law. *Private International Law* by Cheshire & North, 10th Edn. sets out the proviso to the rule as follows at p. 127:

> The established rule is that knowledge of foreign law, even of the law obtaining in some other part of the Commonwealth is not to be imputed to an English Judge. Unless the foreign law with which a case may be connected is pleaded by the party relying thereon, then it is assumed that it is the same as English law. The onus of proving that it is different, and of proving what it is, lies upon the party who pleads the difference. If there is no such plea, or if the difference is not satisfactorily proved, the Court must give a decision according to English law, even though the case may be connected solely with some foreign country.

In a note to this the learned authors refer to *National Shipping Corporation v. Arab* [1971] 2 LLL Reports 363. To suggest that the proviso may not apply where the plaintiff asks for summary judgment. With respect I do not think that National Shipping Corporation amounts to that. There the triable issue was whether Saudi Arabian or Pakistani law applied and some attempt was made to set out by affidavit what the relevant Saudi Arabian law on the subject was and what the Pakistani law on it was, the affidavits in each case suggesting that the law on the subject was different from English law. It is in that background that Lord Justice Davies ended his judgment by stating:

> I think it is equally, if not more difficult, for the Court to try a question as to what is the law of Saudi Arabia, if it applies, or what is the law of Pakistan, on affidavit.

In the instant case there is no suggestion that the relevant English law is any different from Malaysian law on the subject. Accordingly even though this is an O. 14 application I am of the view that the passage from Cheshire & North operates without any qualification.

The 3rd and last point made on behalf of the defendants fails.

The appeal is dismissed with costs. However I direct that the order dismissing the appeal shall not be perfected until the Senior Assistant Registrar of this Court has been satisfied that the two bills of exchange, the subject of this action, have been duly stamped and penalties for late stamping have been paid or exemptions therefore have been obtained.

Also found at [1989] 2 CLJ 1005